

**IN THE MATTER OF THE EMPLOYMENT ACT 2000 BEFORE THE
EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL (the "Tribunal")**

BETWEEN

Complainant

AND

Defendant

DECISION

Dates of Hearings: 15th February 2022

10th March 2022

Present:

John Payne, Chairman

Jocene Harmon, Tribunal Member

Orin Simmons, Tribunal Member

Counsel for the Complainant
with Counsel for the Complainant
Complainant

Counsel for the Defendant
Defendant

Background

1. The Complainant has filed that her employment contract was unfairly terminated, which is an offence under section 28 of the Employment Act 2000 (the "Act"), and that she is therefore entitled to be compensated in accordance with the provisions of Section 40 of the Act and subsequently entitled to vacation pay and insurance coverage.
2. As the Complainant was claiming unfair dismissal under Section 28 of the Act, the Defendant was directed to present their case first. There was some concern expressed by Counsel for the Defendant, as it was his view that the Defendant should be responding to the allegations. He stated that in his experience the Complainant went first but would abide by the decision of the Tribunal.

History

3. Found at (Defendant's bundle page 152), as prepared by the Vice President, HR & OD for the COO, CNO and COS of the Defendant a summary of the events are:
 - a. The Complainant, was employed as a full time [redacted] with the Defendant for 16 years, having commenced employment 12th January 2004.
 - b. The Complainant was placed on sick leave and administrative leave commencing 25th June 2018, which continued to 15th July 2019. During that period her case was reviewed for continued employment, based on her appeal to the [redacted] (MRB). The MRB upheld her appeal for continued employment, with the condition that a Return To Work Plan be formulated that would be time bound, and that would assess the Complainant's performance and fitness, along with sustainment of her performance for continued and long term employment with the Defendant.
 - c. The Return to Work Plan was formulated. The Complainant's performance was documented, assessed, and managed by both MU (as an independent review) and the AHS team over a 12-week period. There were weekly reports completed
 - d. The assessment period for the Complainant ended 4th October 2019 and she was placed on her second period of administrative leave.
 - e. The Complainant continued to be on administrative leave until the review, assessment and outcome of all her reports relating to her Return to Work Plan was completed and a decision regarding her employment as [redacted] is reached.

The Hearing:

4. Both parties were invited to present opening statements, however Counsel for the Defendant declined.

Counsel for the Complainant Opening Statement

5. Counsel for the Complainant indicated that the Complainant had been working as . She had started a 12 week Return to Work Plan. There was a change in the process without consultation. The Complainant was instructed not to return to work until an assessment and decision was made to her employment status. After a year of waiting, she was provided with a document indicating that she was no longer employed as . The Complainant asked to have the assessment period extended. The Complainant was invited to participate in a skills assessment to determine where else in the organization she could work. The Complainant did not accept the decision or the offer to participate in the skills assessment. The Complainant was terminated and is now claiming unfair dismissal.

The Case of the Defendant

6. Counsel for the Defendant indicated that he was not going to ask any questions of the witnesses, and he would leave the Complainant's opening statement as submitted.
7. To assist with the Tribunal's deliberation a summary of each witness statement was provided.
8. **evidenced:**
 - a. Every in Bermuda must be approved by the Board ().
 - b. The Complainant was not approved because she failed to successfully pass the 12 week Return to Work Plan.
 - c. It was not common practice or policy to allow the entire staff to be off at the same time.
 - d. The Complainant was not reprimanded for being on the ward. It was style not to reprimand but to encourage staff to complete work in the given time frame.
 - e. Discussions were held with the Complainant regarding the quality of her clinical notes.
 - f. The Defendant has been chronically understaffed by hence staff normally seek assistance when necessary.
 - g. The Complainant took long to prepare notes which is a time management issues not a clinical competence issue.
9. **Cross examination of :**
 - a. The assessment document initially shown to the Complainant was an older version used during the assessment. However, the only difference was the rating scale.
 - b. could not give an explanation why the documents were changed.
 - c. At the start of the Return to Work Plan, the intent was to lead to a score to permit the Complainant to return to work.

- d. believes that the specific that the Complainant was assigned to was used for the assessment because it had more robust cases for
- e. It was not her decision not to grant an extension of the assessment.

10. in her statement indicated:

- a. The Defendant made facilities available for the Complainant to keep her skills up to date but the Complainant did not avail herself of those facilities.
- b. further advanced that the Complainant was told she must meet the performance standards of an or the Defendant would have no alternative but to discontinue her employment.
- c. felt that the Complainant could not claim she had no warning that her employment may come to an end.
- d. As the Complainant was no longer considered by the to be qualified, she should not have expected the Defendant to continue her employment as an .

11. Cross-examination

- a. The Return to Work Plan had 2 functions one being supportive and the other to provide a teaching opportunity if there was a deficiency.
- b. role was to ensure that the process agreed to was being followed.
- c. The full 12-week assessment was conducted. (The final 2 by).
- d. It was not reported to her that there had been change in the assessment document.
- e. She had no role in the termination of the Complainant.

12. in her statement indicated:

- a. She conducted the last two weeks of the Return to Work Plan as was on prearranged leave.
- b. That during 2016 the Complainant did attend one session to improve her Microsoft Suite skills. This Microsoft Suite was the tool used for clinical report writing and departmental communication.
- c. The document used to assess the Complainant was developed by the and not by Defendant.
- d. The Complainant was not approved by the to work as an in Bermuda.

13. Cross examination :

- a. Believes that the assessment tool was from 2014.
- b. She was not involved with the decision to terminate and believes that part of the reason was the Complainant not being licensed.
- c. Is aware the Complainant had an opportunity to be assessed.

14. in her statement indicated:

- a. Indicated that the history relating to the termination of the Complainant is long and involved.
- b. In 2019 the Complainant was found by the Consultant to be unfit to perform the duties of an in the long term.
- c. HR recommended in January 2020 to the CEO based on the Consultant's report that the Complainant be terminated.
- d. The matter was not dealt with until August 2020 due to the COVID pandemic.
- e. The Complainant did not engage in the process to explore other employment opportunities as evidenced by (Defendant's bundle pages 223/224)

15. Cross Examination :

- a. Advised that standard policy was followed.
- b. She was not involved in the process to terminate which was:
 - i. Based on a recommendation received from the Consultant,
 - ii. Given to the VP of HR,
 - iii. Who in turn forwarded the recommendation to the CEO.
- c. Indicated that her role was to ensure that the process that was agreed was carried out.
- d. The Consultant was not involved in the discussion process.
- e. That in April 2019 the meeting made it clear that this was the final / last opportunity.

The Case of the Complainant

16. The Complainant provided a witness statement in her documents.

17. The witness statement was accepted, however Counsel for the Complainant sought clarification on a few points.

18. The Complainant indicated that she was given three options after she was told that no longer wanted her:

- a. The document was from and any questions should be directed to her.
- b. To participate in a series of skills assessments and based on the results a possible post would be determined but there were no guarantees.
- c. If she was not interested the Defendant was prepared to offer a settlement, including health insurance.

19. The assessment was 10 weeks not 12 weeks. The Complainant believed that there would have been an extension as she was only 5 points off. The Complainant stated that she felt that HR would allow an extension.

20. Cross Examination of the Complainant

21. Counsel for the Defendant advised that he had 17 questions for the Complainant.

22. Did not believe that the last two weeks counted, as was just a physiotherapist and a contact person.

Tribunal Caucus

23. The Complainant had difficulty finding documents referred to by Counsel for the Defendant. This was challenging for all parties especially as the Complainant and Counsel for the Complainant were not in the same room during the first hearing. The Tribunal took a caucus to discuss the matter and decided to adjourn to another date. This was agreed by both parties. The administrator was directed to set another mutually agreed date. In addition, Counsel for the Defendant offered to paginate the Complainant's bundle if that would be helpful.

Day Two

24. The Hearing started with the Chairman indicating that he had been advised that the Complainant would not be present to participate in the proceedings. She was in the midst of being cross examined when the proceedings had been adjourned.

25. The Chairman expressed concern that the information was received late and that no details were provided for the absence other than her son was due to have an emergency medical procedure. This reason was similar to that provided last year which prevented a start of the matter for over 3 months.

26. The Chairman indicated that he was prepared to invoke General Powers, Section 44C (1) (a) of the Act unless he could be persuaded otherwise. Section 44C (1) (a) states: "*(1) Without prejudice to any other powers conferred upon it under the Employment Labour Code, the Tribunal may- (a) proceed to hear and determine any matter in the absence of any party who has been duly summoned to appear before the Tribunal and failed to do so*"

27. Both parties were invited to give reasons why the matter should be further delayed.

28. Counsel for the Defendant advised that:

- a. Several allegations were made by the Complainant that were not true.
- b. His client was at a disadvantage as he would not have the benefit to cross examine the Complainant.
- c. The rules of evidence would require that the Complainant witness statement be given no weight as it could not be challenged.

29. Counsel for the Complainant responded:

- a. Both parties' presentations must be given equal weight.
- b. The Tribunal could accept the evidence in chief of the Complainant.
- c. Believed that both sides should have the opportunity to be heard.
- d. A delay of two weeks should not be onerous.

30. While understanding the position of the parties the Chairman indicated that he was not prepared to delay the matter any further and that it would proceed.

Closing Submission of the Defendant

31. Counsel for the Defendant indicated that this dispute is going to turn on the credibility of the witnesses.

32. He was of the view that any weight given to a witness statement where the witness cannot be cross examined is diminished when compared to a witness who undergoes cross examination.

33. That the Defendant supported all of the contentious issues by documentary evidence.

34. Allegations made by the Complainant regarding _____ was never put to the witness under cross examination.

35. That the issue of the two evaluation tools was addressed and it was the newer version that was used.

36. The claim that clinical errors were made by the Complainant was never challenged.

37. The evidence of the _____ indicated that the onus was on the Complainant to demonstrate that she was still competent to perform the functions of an _____

38. The Complainant was not terminated by the Defendant, as she was no longer fit to practice as an _____ and that she did not respond to the attempt by the Defendant to find alternative employment. (Defendant's bundle pages 223-224)

Closing Submission of the Complainant

39. The letter (Defendant's bundle page 117) by the Defendant is a clever ruse as it is not possible to tell what had really transpired.

40. The Defendant tried to indicate that the decisions made were by other bodies not the Defendant.

41. That [redacted] did not deny that the Complainant may have been sent both documents even though she claims that the Complainant as an [redacted] should have known better.
42. There is no evidence that the preceptor was consulted.
43. The person who made the final decision should have been used as a witness to testify. (Counsel for the Defendant interjected that the other side had the opportunity to invite the Vice President of Human Resources).
44. Shows that a decision was already made to terminate the Complainant.
45. There was no assessment at week 12 there was an assessment at week 10.
46. Believes that the Complainant was unfairly dismissed. The termination letter of 20 Sept 2020 was only given based on the reassessment period and was not the true intent of the Defendant.
47. The Defendant had a duty to mitigate because the only thing offered was another assessment. The Complainant contends that the Defendant had other information to determine alternative employment outside of the assessment.
48. There was no genuine attempt by the Defendant to redeploy in an alternative post.
49. It was never put to the Complainant that there was another post.
50. Want the Tribunal to find in favor of the Complainant that the evidence before it is a mix of live evidence and printed documentation, in equal manner weight should be allowed.

Rebuttal of the Defendant

51. Counsel for the Defendant invited the Tribunal to test the evidence based on the ability to cross examine.
52. The determination should be based on law.
53. Counsel for the Defendant also made it clear that any appeals must be made on a point of law.

Deliberation

Having heard the positions of both parties the Tribunal considered the following:

54. The Defendant appears to have followed the requirements of the policies related to with respect to sending the Complainant for assistance. These policies are located at (Defendant's bundle page 3), [redacted] dated 8 March 2018 and (Defendant's bundle page 1),

Referral of Employees to Other Healthcare Services, 1st April 2019 both signed by the Vice President of Human Resources.

55. The Tribunal noted that the Defendant's witnesses' statements focused on the Complainant's inability to pass the Return to Work Plan as set by the as well as not participating in the skills assessment proposed.
56. The Complainant's unsuccessful attempt failing by 5 points should under normal circumstances give rise to a further extension as possible by the process.
57. There was no reference made to poor work performance based on annual performance appraisal. Therefore, it is assumed that the Complainant's work performance was at least adequate prior to her illness in 2018.
58. It was noted that little or no mention during witness statements or cross examination was made of the clinical reports by:
 - a. The MD for dated of 2018.
 - b. Email of 4th March 2018 from the Clinical Psychologist
 - c. The letter to the Complainant from the MD for EHS dated 5th September 2018 (Complainant bundle 89)
 - d. The letter to the COS from the CP, from 30th November 2018. (Complainant bundle p51)
 - e. The Consultant, addressed to the COS dated 21st October 2019 (Defendant's bundle page 220)
59. The Tribunal believes that the Defendant's case was selective in its approach omitting this information in the witness statements that they may have thought to be prejudicial to its case even though the information was provided in the exchange of information.
60. The email from the CP indicated that in clarifying her report of 1st June 2017 regarding the Complainant, advised that *"the neuropsychological testing that was conducted was comprehensive and several recommendations were made so that any weaknesses in her cognitive functioning namely her executive functioning abilities, were adequately compensated for so far as to minimize any impact on her functioning at work"*. No mention was made of these recommendations, or the remedial steps taken to serve these.
61. The letter from the Consultant gave the medical history of the patient followed by provided 7 reasons why in her professional opinion the Complainant *"is unfit to perform the duties of in the long term"*.
62. The Consultant indicated that the Complainant had numerous visits to in 2016, 2017 and 2018 as well as prolonged periods of absence due to mental illness and much time

spent on sick leave due to anxiety and depression. Reference was made also to a diagnosis of Dissociative Disorder by a psychiatrist at MAWI in 2018.

63. The MD's response to the Complainant dated 5th September 2018 (Complainant bundle 89) fully explained the clinical rationale why the Complainant was unfit to continue working as an . Stating " ...up to the point when it became apparent in April of 2018 how seriously impaired you could become at work and the diagnosis of Dissociative Disorder, which is a rare Psychiatric Disorder, made by a competent Psychiatrist."
64. The Tribunal noted Dissociative Disorders are mental health disorders that involve experiencing a disconnection and lack of continuity between thoughts, memories, surroundings, actions and identity. Persons with dissociative disorders escape reality in ways that are involuntary and unhealthy and cause problems with functioning in everyday life. These statements were made by the Mayo Clinic on their website. One of the symptoms include the inability to cope well with emotional or professional stress.
65. In its deliberation, the Tribunal noted some of the reasons given for by the Consultant for her conclusion were:
- a. *The diagnosis of Dissociative Disorder by MWAL. It was stated that there were comorbidities of Sleep Apnea, Depression and Anxiety, along with the use of a CPAP machine. The Complainant was compliant with her treatment.*
 - b. *However, the Complainant had difficulty setting goals, prioritization to facilitate productivity and caseload management, as well as poor time management that impacts her clinical responsibilities.*
 - c. *The satisfactory pass rate in the departmental review was not achieved even after discussion in our sessions on ways to improve note taking and overall assessment, formulation of treatment and execution strategies.*
 - d. *Ongoing home stressors that have improved with support, but still remain and have the potential to escalate without warning also have the potential to impact her ability to function at work in the future.*
66. The Tribunal is of the view that the departmental review which showed weakness in the fundamentals of the Philosophy, intervention, and strategies to break down barriers to treatment could have been caused by an impairment of cognitive function that is absolutely needed as an .
67. There was no witness statement from any clinician or the VP of HR. This is viewed as surprising as it was the VP of HR who wrote to the Complainant on 23rd November 2020 (Defendant's bundle page 223) terminating the employment relationship based on:

- a. The Defendant not receiving a response by the deadline of 9th September 2020 regarding any participation in the skills assessment for possible alternative employment.
- b. The Complainant was no longer fit to perform the duties of and
- c. Therefore, was terminated on the basis of Frustration of Contract.

68. Frustration of Contract as outlined in Frustration in Contract Law: a remedy by Farrer & Co, applies **where an unforeseen event makes performance of the contract impossible**. It is generally accepted that the contract comes to an end without fault of either party.

Conclusion

In the Tribunal's examination of the evidence, the following discoveries must be carefully considered:

- 69. The entire sequence of events was entangled between two requirements; the need to have the Complainant assessed for continued employment by the Defendant as an and the requirement that the Complainant be registered under the relevant legislation.
- 70. Counsel for the Defendant did not appear to clearly articulate the difference, hence the use of the assessment tool from the appears to have added to the confusion.
- 71. The Defendant at various levels was not supportive in a manner consistent with the clinical diagnosis of a long standing staff member of years. Further, the delay of a year to reach a decision was totally unacceptable notwithstanding the national issues occurring during that period.
- 72. The Tribunal opine that following the diagnosis of Dissociative Disorder in 2018, the Defendant could have considered severing the contract between the parties as the medical assessment of the clinician at that time was quite clear. However, matters were compounded by the decision of the MRB.
- 73. While the Complainant would qualify as "disabled" as defined in the Human Rights Act 1981 the application of the 2011 amendment relating to Unreasonable Hardship would have been dependent on the Complainant meeting the requirements of the relevant legislation to continue practicing as an .
- 74. The Complainant would NOT have been capable of performing adequately in the long term based on the clinical mental health diagnosis provided by the two clinicians, regardless of any position offered.


75. With respect to the Complainant registration there is no legal requirement for an employer to assist with re-registration. Therefore, the responsibility was for the Complainant solely to address this matter with the .
76. The Defendant could not continue the employment of the Complainant as an in the absence of a registration license.
77. The inability to be re-registered effectively terminated the employment contract as an
78. The Complainant not participating in the skills assessment as suggested by letter defaulted by omission for consideration of further employment by the Defendant.

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Determination

79. Having given the parties full opportunity to give evidence on oath and to make submissions, it is the conclusive Determination of this Tribunal that:
- a. The Defendant did not offend section 28 of the Act, Unfair Dismissal.
 - b. The Complainant is not entitled to compensation, vacation pay and insurance coverage.
80. The parties to this Hearing have acknowledged that the Determination of this Tribunal is final and binding. Any party aggrieved may however appeal to the Supreme Court of Bermuda on a point of law.
81. The Tribunal makes no further Determination in this matter


Dated this 21st day of April 2022



John Payne
Chairman



Jocene Harmon
Tribunal Member



Orin Simmons
Tribunal Member